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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.

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To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Julia Obartuch respectfully shows unto this Honorable Court:

A.

Summary Statement of the Matter Involved.

This was an action brought in the Superior Court of Cook County, Illinois, by petitioner, as beneficiary, upon two policies for $10,000 each, insuring the life of her husband, Frank Obartuch, issued by the respondent. Upon removal to the District Court of the United States, a jury was waived. The District Court found the issues for the respondent, and its judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit, one judge dissenting.

Although questions of law only were decided by the Court of Appeals, the consideration of such questions and the matters presented by this petition requires some reference to the pleadings, proceedings and evidence in the District Court.

The Pleadings.

The complaint was in the usual form with the two policies set forth *haec verba*, including the incontestable clause[1] (R. 3-5). Prayer for summary judgment of $20,000 with interest from November 21, 1934 was supported by petitioner's affidavit under the Illinois Practice Act (R. 6, 7).

Respondent's answer admitted the execution and issuance of the policies, dated June 27, 1931 and July 28, 1931, the death of Frank Obartuch on October 28, 1934, the payment of all premiums and that said policies had been in full force and effect for more than two years (R. 10, 14); but denied liability for the sum demanded thereon or that petitioner was entitled to any payment except $4,855.60, the amount of premiums paid, for the reasons,

> (1) That some person unknown to respondent was fraudulently substituted for Frank Obartuch at the medical examination, said unknown person having been falsely represented to respondent's examiner, Eli Rubens, to be Frank Obartuch by respondent's agent, A. J. Friedman (R. 11); and
>
> (2) That the application for said policies was void as either
>
> (a) Frank Obartuch did not sign or authorize anyone to sign said application, or
>
> (b) Frank Obartuch did not knowingly sign said application (R. 11, 12).

---

1. This clause provided: "Incontestability.—This policy and the application therefor, a copy of which is endorsed hereon and attached hereto and made a part hereof, constitute the entire contract between the parties and shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue, except for the nonpayment of premiums and except as stated in the clause relating to Military or Naval Service * * *" (R. 73, 74).

The answer further alleged that the respondent, on March 14, 1935 [5½ months after Frank Obartuch's death], notified petitioner of its election to rescind said policies for fraud, and tendered the amount of the premiums paid thereon to Michael and Henry Obartuch, sons of Frank Obartuch, who had paid the premiums, which tender was refused (R. 13, 14).

It was further alleged that the policies were void because of a misrepresentation of the age of Frank Obartuch under a certain rule of respondent as to endowment policies (R. 12).

The District Court denied petitioner's motion for summary judgment for want of a substantial defense (R. 21, 22).

Limitation of the Issues for Trial.

Petitioner contends that respondent voluntarily submitted the case for trial by the District Court upon the sole issue of the alleged fraudulent substitution of some person other than Frank Obartuch at the medical examination, thereby waiving and abandoning all other defenses set up in its answer, including the question whether Frank Obartuch knowingly signed the application.

The record shows that when the case was called for trial, counsel discussed with the Court the waiver of a jury pursuant to a prior agreement. During the course of this discussion, **counsel for the respondent stated on three occasions that the only issue which the respondent was presenting for trial was whether there was a substitution of another person at the medical examination** (R. 64, 65, 66).

In his opening statement, counsel for respondent stated that it was immaterial whether Frank Obartuch signed the application and that **it would still be immaterial "if he**

knew what he was signing and somebody else took the medical examination''[2] (R. 66).

The Court of Appeals concluded that the issue as to signing was not waived, although the Court expressed some doubt as to its decision in that regard (R. 739). That Court pointed to a statement of respondent's counsel, made when petitioner was offering proof of Frank Obartuch's signatures on the application, that he contended that either these signatures were forgeries or he did not know what he was signing (R. 739, 97). But the Court of Appeals disregarded the fact that *thereafter* when petitioner renewed her motion for judgment, it was expressly predicated upon the statements of respondent's counsel that the only issue was the question of substitution (R. 102), and that during the discussion of said motion it was stated that when the motion for summary judgment on the pleadings was made there were two issues, respondent contending that the insured had not signed the application, whereas at the trial the only defense was that of substitution (R. 103-105). Numerous objections to evidence were made by petitioner's counsel based on the ground of irrelevancy to the only issue presented for trial by respondent, that of substitution at the medical examination, and at no time did counsel for the respondent state that such was not the fact.[3]

The record further shows that respondent's counsel persisted in the theory that the only defense necessary to present was that of the alleged substitution at the medical examination, for during an argument on the admissibility

2. This part of the statement of respondent's counsel was omitted in the quotation of such statement in Footnote 2 of the opinion of the Court of Appeals (R. 738).

3. These objections and the colloquy thereon are collected in an appendix to the Petition for Rehearing in the Court of Appeals (R. 779-789) and also appear in the Record at pages 102-105, 161, 170, 172, 173, 228, 243, 277, 287, 371, 380, 383, 438, 659, 661 and 662.

of certain evidence he stated that if Frank Obartuch "knew that there was a substitution, the policy would be, notwithstanding, void" (R. 394). Respondent maintained the same position in the Court of Appeals, where it stated in its brief (quoted in the petition for rehearing in the record here):

> "We still maintain that the issue in this case, confused and befogged as it has been by plaintiff's brief, is whether a substitution in the medical examination for the named insured is a defense under the incontestable clause." (R. 775.)

The Evidence.[4]

1. *As to the Alleged Substitution.*

Frank Obartuch, the insured named in the policies in suit, was born in Poland and came to this country in 1897. He was naturalized in 1909 at Chicago, where he resided with his family, consisting of his wife Julia, the petitioner, his sons, Michael and Henry William, and his daughter, Matilda.

The medical examination for these policies was made at the Obartuch home on June 11, 1931 by Dr. Eli Rubens, respondent's examiner. Dr. Rubens examined the son Henry at the same time, filling out applications, in three parts, for Frank Obartuch and Henry William Obartuch[5] (R. 106, 107, 113).

The petitioner and four other persons, the two sons, the daughter and one Thomas J. McCormick, an attorney, testified that they were present during these examinations, that Frank Obartuch was examined by Dr. Rubens, who

4. We set forth only such part of the evidence and proceedings as are material upon the questions here presented.

5. These applications are to be found in the record as follows: For Frank Obartuch, Part 1 (R. 79), Part 2, Questions of Medical Examiner and Answers thereto (R. 118), Part 3, Medical Examiner's Report (R. 116); for Henry Obartuch, Part 1 (R. 428), Part 2 (R. 324), Part 3 (not admitted R. 431).

asked him certain questions and wrote on a paper, after which Frank Obartuch signed said paper and the doctor signed it (R. 449, 475, 537, 589, 609).

Dr. Rubens, called by the respondent as its witness, testified that he met the respondent's agent Friedman in front of the Obartuch home and that Friedman took him into the home and introduced him to two men, one represented as Frank Obartuch, and the other his son[6] (R. 132). After testifying that the three parts of the application for Frank Obartuch were in his handwriting (R. 107) and to various steps in the examination (R. 110-112), Rubens stated that a photograph of Frank Obartuch then shown to him, was not that of the person he had examined (R. 113).

Thereupon respondent offered and the Court admitted in evidence, as *Defendant's Exhibits* 4 and 5, Part 3 and Part 2 respectively of the application of Frank Obartuch (R. 115). Part 2 is the "Questions of the Medical Examiner and Answers Thereto", dated June 11, 1931 (R. 118, 119). It was completely filled out by Dr. Rubens except for the signature of Frank Obartuch, who declared above his signature that he was the person described therein, that he had reviewed and understood all the questions and answers, which, as written were full, complete and true. To the left of the signature of Frank Obartuch appears the following declaration over the signature of Eli Rubens:[7]

> **"I declare that I saw the applicant attach his signature to this application, and that the applicant reviewed with me the above agreement and answers to questions (all of which were written in in ink) before he signed the same.**
>
> **(s) Eli Rubens, M.D.,**
> **Medical Examiner.**
>
> **Dated at Chicago, Ill., this 11th day of June, 1931"** (R. 119).

---

6. Friedman also testified as respondent's witness and denied he introduced Rubens to a person he said was Frank Obartuch (R. 333).

7. Because of the importance of Parts 2 and 3 of this application, we respectfully refer the Court to the photostatic copies thereof in the Record at pp. 116-119.

Respondent's counsel then asked Dr. Rubens if the person represented as Frank Obartuch signed this Part 2 of the application in his presence. Petitioner's counsel objected on the ground that Rubens had so certified in the application itself, but the Court permitted the witness to answer (R. 121, 122). Thereupon Rubens testified that the man named Frank Obartuch did not sign any documents in his presence (R. 122).

No further questions concerning the execution of the application were asked by respondent's counsel. On cross-examination Rubens testified that after writing the answers to the questions, he left the application with the man represented as Frank Obartuch, and in the case of Henry William Obartuch he left it with Henry. Rubens further stated that he next saw the applications the day following these examinations at the insurance office (R. 130).

No further testimony concerning the circumstances of the execution of the declaration or certificate of Rubens on Part 2 of the application was elicited by the respondent. However, the inferences drawn from his testimony by the Court of Appeals requires a reference to the record showing as to the date upon which these documents were executed. All of the parts of the application were dated by Rubens "June 11, 1931," the date on which the medical examination took place according to the testimony of witnesses for both parties. Moreover, the respondent recalled Rubens in rebuttal for the purpose of corroborating the time of these examinations and Rubens then testified that June 11, 1931 was on a Thursday and that he specifically recalled going from the Obartuch home after these examinations to the Mt. Sinai Hospital on this particular Thursday, *i. e.*, June 11, 1931 (R. 675).

[It should be noted at this point that not only did Rubens deny the fact certified over his signature and incorporated into the policies, but when called upon by the petitioner,

not by the respondent,[8] to explain his self-contradiction, he testified to two matters, the falsity of which appears from common knowledge of the conduct of insurance examinations. By this testimony Rubens claims that he turned over to the person examined the medical questions and the answers written by him, containing his signature to a certificate that he saw the applicant sign the same, without having procured the signature of the applicant thereto, and that in some unexplained manner that application appeared at the insurance office the following day. More incredible, if that is possible, is the fact that the document, which Rubens said he left with the applicant, contained on its reverse side (R. 108, 115), Part 3 of the application, the medical examiner's confidential report to his company for the purpose of determining insurability. This part of the application is not attached to the policy and is never shown to the applicant by the company or any of its agents (R. 108, 109). Part 3 of this application (R. 116, 117) was completely filled out by Rubens, except for his findings on the urinanalysis which were recorded thereon the next day at the insurance office (R. 124). Thus, by this testimony Rubens claims that he delivered to the applicant his confidential report showing that he unreservedly recommended the applicant for insurance (R. 117) prior to submitting the same to his own company.]

2. *As to the Signatures to the Application.*

The policies in suit were issued upon one application and medical examination. The second policy was issued upon an amendment dated in August, 1931 (R. 87). Another amendment as to the age of Frank Obartuch was executed on July 3, 1931 (R. 89). The signatures of Frank Obartuch on these two amendments and on Part 1 of the application, dated June 11, 1931, were witnessed by the respondent's

8. Respondent's counsel contended that Rubens' testimony contradicting his certificate was admissible, stating "Now, the certificate there is not under oath. He is under oath now" (R. 122).

agent A. J. Friedman. The signature to Part 2 was made in the presence of the examiner Rubens, according to the certificate signed by Rubens (R. 119).

Proof that these documents bore the genuine signature of Frank Obartuch was made (R. 98, 99) and nothing to the contrary appears in the record. Moreover the record shows that when counsel for the petitioner objected to the findings of fact submitted to the District Court by respondent, on the ground that the respondent had waived any right to impugn or contradict the signature of Frank Obartuch, that Court not only agreed that there had been such a waiver, but also stated:

"There is no question about his signature" (R. 705).

3. *As to Other Matters.*

The evidence in the record as to other matters than those considered above covers a wide range. The respondent introduced evidence as to the age, physical characteristics and the ability of Frank Obartuch to speak, write and read the English language, his financial condition and state of health both prior and subsequent to the issuance of these policies, the payment of premiums thereon by his sons, the disruption of the family relationship in October, 1933, more than two years after the policies were issued, and his unsuccessful attempt by suit to cancel a deed to certain real estate to one of his sons. Attorneys, who represented Frank Obartuch in connection with his family troubles, were permitted to testify to statements, attributed to Frank Obartuch, that he had certain insurance policies, making no reference to the policies in suit, or to denials that he had any policies with the respondent company.

We mention this evidence briefly for the reason that it will be stressed by the respondent. However, none of these matters is material, indeed the evidence concerning the same should have been excluded, if the questions of law

presented by this petition, the only questions considered by the Court of Appeals (R. 737), are resolved in favor of the petitioner's contentions. All of the proffered evidence concerning matters outside the scope of the sole issue presented for trial by respondent, that of the alleged substitution at the medical examination, was received over petitioner's objections (R. 779-789).

Findings and Conclusions of the District Court.

At the conclusion of the trial, the District Court found the issues for respondent, stating that in his opinion "this was a brazen attempt to perpetrate a colossal and gigantic fraud in order to obtain money unlawfully and illegally" (R. 702).

That Court refused a Conclusion of Law submitted by the petitioner to the effect that the defense of fraud, including the substitution of another person for the insured at the medical examination, was barred by the incontestable clause of the policies under the law of Illinois applicable thereto (R. 703, 704).

The Court entered findings of fact and conclusions of law submitted by respondent. The substance of the findings was:

1. That the policies in suit were issued upon the life of some person other than Frank Obartuch, which other person submitted to a medical examination by Dr. Rubens;

2. That *if Frank Obartuch signed* the insurance application and answers to questions of the medical examiner and amendments thereto, he did so, not knowing the contents of said documents or with the intention of obtaining insurance from the respondent (R. 711);

3. That the policies were obtained by the petitioner and her sons, without the knowledge or consent of Frank Obartuch, by the substitution with their knowledge of a person other than Frank Obartuch at the medical examination (R. 712).

The substance of the Court's conclusions of law was:

1. That it is contrary to public policy for any person to obtain life insurance by substituting an individual other than the name insured for medical examination, and a policy secured by such substitution is void (R. 712, 713).

2. That the incontestable clause in the policies in suit does not preclude the defense that the person examined by the defendant's medical examiner was not Frank Obartuch, but someone else who impersonated said Frank Obartuch (R. 713).

3. That said policies did not constitute a valid contract with Frank Obartuch and, if valid at all, were contracts upon the life of the person examined by the defendant's medical examiner (R. 713).

4. That there was never any valid contract of life insurance upon the life of Frank Obartuch because he never knowingly signed any application therefor or authorized any other person to sign an application for him (R. 714).

OPINIONS AND JUDGMENT OF THE COURT OF APPEALS.

The Court of Appeals refused to apply the law of Illinois, which precludes the defense of fraud in procuring policies after the contestable period has expired, on the ground that the policies in suit were not merely voidable but were void *ab initio* by reason of the finding that Frank Obartuch did not knowingly sign the application (R. 742). To reach this conclusion the Court determined that the respondent had not waived the issue raised by its answer as to the signing of the application (R. 739), although the Court was uncertain and expressed some doubt as to its conclusion in that respect. The Court noted that the statements of respondent's counsel were confusing as to the issue which it intended to rely upon, but held that, taken as a whole, it appeared that the respondent did not intend to dispute that the genuine signature of Frank Obartuch appeared on the application but that he signed without knowl-

edge of its contents (R. 738). The Court also said that the finding on the issue as to signing was pertinent to the issue of substitution (R. 739). These conclusions are further weakened by the fact that the Court, in setting out pertinent statements of respondent's counsel (R. 738), **omitted the statement of respondent's counsel that even if Frank Obartuch knew what he was signing, it was immaterial to respondent's defense of substitution** (R. 66).

On the second question, as to the admissibility of Rubens' testimony contradicting his certificate in the policy, that Frank Obartuch's signature to Part 2 of the application was attached in his presence, the Court of Appeals held, in its first opinion, that the Parol Evidence Rule was inapplicable because the defense was fraud which rendered the contract void *ab initio* (R. 743). After the reargument directed by the Court upon the petition for rehearing, the Court filed an additional opinion[9] on the question of the admissibility of Ruben's testimony. In this latter opinion, the Court recognized that the exception to the Parol Evidence operated only when the execution of the instrument sought to be varied by parol was induced by fraud. The Court justified its original holding by concluding that Rubens' signature to his certificate was the result of fraud practiced upon him. This conclusion was predicated upon an inference[10] that Rubens did not sign this certificate until the day following the examination and that it was then represented to him by some interested in procuring the insurance that it had been signed by the person he examined the day before (R. 814). The Court also purported to distinguish the case of *New York Life Insurance Co.* v. *Stewart*, 69 F. (2d) 957, in which the

9. The first opinion was filed April 12, 1940 and the opinion on the petition for rehearing was filed August 14, 1940.

10. Reference to the summary of the evidence on pp. 5, 7 hereof shows that these "inferences" are contrary to the respondent's own evidence and the testimony of Rubens as to the date of the examination.

Court of Appeals for the Fifth Circuit expressly held that testimony of a medical examiner was inadmissible because it contradicted statements in an insurance application, by stating that the *Stewart* case was decided upon grounds of estoppel (R. 814, 815).

The Court denied the petition for rehearing and affirmed the judgment of the District Court. Judge Treanor filed a dissenting opinion stating that the petition for rehearing should be granted and the judgment of the District Court reversed (R. 817).

On October 1, 1940 the Court granted petitioner's motion for leave to file a second petition for rehearing but denied said second petition (R. 839).

B.

Jurisdiction.

Statutory Provision Believed to Sustain Jurisdiction.

The statutory provision under which jurisdiction of this Court is invoked is Title 28, U. S. C., § 347 (a) (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Dates of Judgment and Denial of Petitions for Rehearing.

The date of the judgment to be reviewed is April 12, 1940 (R. 746).

The petition for rehearing was denied, after reargument thereon (R. 811, 812), on August 14, 1940 (R. 817), one judge dissenting (R. 817).

Petitioner's motion for leave to file a second petition for rehearing was granted, and said second petition for re-

hearing was denied on October 1, 1940 (R. 839). Since the second petition was entertained, the statutory period of time within which application to this Court for a writ of certiorari may be made, runs from the date the second petition for rehearing was denied, namely, October 1, 1940. (*Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498.)

C.

Questions Presented.

1. Whether the testimony of the respondent's medical examiner contradicting the fact certified by him in the application, attached to and made a part of the policies in suit, that the person examined by him signed said application in his presence, was inadmissible (a) under the Parol Evidence Rule and (b) under the law of Illinois precluding a party from impeaching documents which such party introduces in evidence.

2. Whether the law of Illinois that the incontestable clause in said policies barred the defense of fraud was applicable to the defense of fraudulent substitution, at the medical examination, of another person for the named insured, where the named insured signed the application and amendments thereto under which said policies were issued.

D.

Reasons Relied Upon for the Allowance of the Writ.

The decision of the Court of Appeals for the Seventh Circuit, in the instant case, squarely conflicts with the decision of the Court of Appeals for the Fifth Circuit in *New York Life Insurance Co.* v. *Stewart,* 69 F. (2d) 957, with respect to the admissibility of parol evidence contradicting statements in an application attached to and made a part of a life insurance policy.

In this case the Court of Appeals for the Seventh Circuit sustained the ruling of the trial court permitting the respondent's medical examiner to testify that he did not see the person examined sign Part 2 of the application, thereby directly contradicting his own declaration and the certificate over his signature in said application.

In the *Stewart* case the Court of Appeals for the Fifth Circuit held (p. 958) that the trial court erred in admitting testimony of a medical examiner which contradicted the statement in the application to the effect that the answers to questions asked by the examiner were written as made by the applicant.

To the same effect, see *Metropolitan Life Insurance Co.* v. *Alterovitz,* 214 Ind. 186, 14 N. E. (2d) 570, 117 A. L. R. 770, 789.

The decision of the Court of Appeals sustaining the admissibility of the testimony of the medical examiner failed to follow or to give effect to the applicable decisions of the courts of Illinois, holding that a party may not impeach its own documentary evidence. It is clear that this testimony denying the facts stated in Part 2 of the application was a direct impeachment of that document, which was offered and received in evidence as Defendant's (Respondent's) Exhibit 5 (R. 115, 118). The Court of Appeals, while expressly stating that Part 2 was respondent's exhibit (R. 743), gave no consideration in its opinion to the decisions of the Supreme Court of Illinois that a party may not dispute or contradict its own exhibits.

Nolan v. *Barnes,* 268 Ill. 515, 521.

Schneider v. *Sulzer,* 212 Ill. 87, 95.

Cuneo Press Co. v. *Industrial Commission,* 341 Ill. 569, 572.

Moreover, Ruben's testimony, denying that he saw the applicant attach his signature to Part 2 of the applica-

tion also impeached the statements made by Rubens in his Confidential Report (Part 3), which likewise was offered by respondent and received in evidence as Defendant's Exhibit 4 (R. 116) over the objection of the petitioner (R. 114). Rubens stated in his Report that he was satisfied that the person he examined was the person represented in the application, and also that he had no knowledge of any facts or conditions, other than those stated therein, which, if known, might affect the judgment or decision in this case (R. 116, 117).

Jurisdiction of the District Court in the instant case, upon removal from the state courts, rested exclusively upon diversity of citizenship. Under the Rules of Decision Act (Title 28, U. S. C., § 725) and the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, it was error for the courts below to fail to apply the law of Illinois as announced by its highest court.

The same point is presented concerning the holding of the courts below that the defense of an alleged substitution of another person for the named insured at the medical examination was not precluded by the incontestable clause in the policies, the period of contestability having admittedly expired.

The decisions of the Illinois Supreme Court are uniformily to the effect that the defense of fraud in the procurement of a life insurance policy is barred by the expiration of the contestable period specified in the clause required by statute, which contains no exception for fraud of any nature.

Royal Circle v. *Achterrath*, 204 Ill. 549, 559.

Flanigan v. *Federal Life Insurance Co.*, 231 Ill. 399, 401.

Weil v. *Federal Life Insurance Co.*, 264 Ill. 425, 433.

Ramsey v. *Old Colony Insurance Co.*, 297 Ill. 592, 595.

Powell v. *Mutual Life Insurance Co.*, 313 Ill. 161, 165.

The law of Illinois in this respect has been applied by the Court of Appeals for the Seventh Circuit in other cases.

State Mutual Life Assurance Co. v. *Stapp*, 72 F. (2d) 142, 146.

Service Life Insurance Co. v. *Weinberg*, 81 F. (2d) 359.

This question was squarely presented for decision, apart from any question as to the manner of signing the application, by Conclusion of Law No. 2 presented by the petitioner to the District Court (R. 203, 704) which the District Court refused (R. 736) and in which ruling it was sustained by the Court of Appeals.

Moreover, the record plainly shows that the issue as to whether Frank Obartuch knowingly signed the application was voluntarily waived by respondent through its counsel (R. 66), and that the case was submitted for trial by both parties on the sole issue of whether another person was fraudulently substituted for Frank Obartuch at the medical examination. It was therefore error for the Court of Appeals to affirm the judgment of the District Court upon a finding of fact on a matter which was not in issue on the trial and to predicate its decision that the incontestable clause did not bar the defense of substitution upon its conclusion that the policies were void *ab initio* because of the alleged finding that Frank Obartuch did not knowingly sign the application.

Furthermore, the fact, conceded in the Court of Appeals, that the application bore the genuine signatures of Frank Obartuch, made on three separate and distinct dates, the

first and last such dates being nearly two months apart, was sufficient, under the law of Illinois, to show that the policies were not void and that they came into existence as contracts to which the incontestable clause applied.

Provident Life Ins. Co. v. *Fennell,* 49 Ill. 180.
Massachusetts Life Ass'n v. *Sibley,* 158 Ill. 411. 42 N. E. 137.

The Court of Appeals undertook to distinguish the holding in the Illinois cases, to the effect that an insurance company was precluded from disputing the recital in a policy acknowledging receipt of payment of the first premium. The stated ground of distinction was that in such cases the validity of the contract, *i. e.*, the policy, was not in dispute, whereas in the instant case, if the defense of fraudulent substitution was sustained, no contract was brought into existence (R. 743, 744). In this respect, the Court of Appeals disregarded the fact that the defense in such cases was predicated upon the fact that the policy, by its terms, never came into existence as a contract binding upon the company because the first premium had not, in fact, been paid by the insured.

Many cases involving life insurance policies are removed to the Federal courts. The questions here raised present not only a conflict between two Circuit Courts of Appeal on a rule of evidence to be applied in such cases but also the failure of the Federal courts below to apply the law of the state as to the effect of the incontestable clause on the defense of fraud and also the law of the state on such rule of evidence.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of record and all proceedings in the case numbered and entitled on its docket, No. 7059, *Julia Obartuch, plaintiff-appellant* v. *Security Mutual Life Insurance Company, a corporation, defendant-appellee,* and that the said judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

JULIA OBARTUCH,
Petitioner,

By ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.